SUPREME COURT, U. S.

JUL 9 1975

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-52

JOHN [redacted] AUSTIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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No. _____

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner Austin prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims, entered on April 16, 1975.

OPINIONS BELOW

The opinion of the United States Court of Claims is set out in the Appendix, infra. John Samuel Austin v. The United States, No. 5-74 (Ct.Cl., April 16, 1975.

JURISDICTION

The judgment of the United States Court of Claims was entered on April 16, 1975. This Court has jurisdiction under 28 U.S.C. §1255(1).

QUESTION PRESENTED

Whether a career enlisted man in the Armed Forces has a "property interest" in a career in the Armed Forces, protectable by the Fifth Amendment "due process" clause.

STATUTES AND REGULATIONS INVOLVED

Title 10, United States Code, Section 508, provides as follows:

508. Re-enlistment--qualifications

(a) No person whose service during his last term of enlistment was not honest and faithful may be re-enlisted in an armed force. However, the Secretary concerned may authorize the re-enlistment in the armed force under his jurisdiction of such a person if his

conduct after that service has been good.

Bureau of Naval Personnel Manual Article C-10312, codified presently as 32 C.F.R. 730.13 (b)(1), which provides in pertinent part as follows:

> Members [enlisted men of the Navy] may be recommended for discharge for the following causes but processing is mandatory for cases within the purview of subparagraphs a and b:
>
> (a) Conviction by civil authority (foreign or domestic) or action taken which is tantamount to a finding of guilty of an offense that:
>
> (1) Authorizes imposing a maximum penalty under the Uniform Code of Military Justice of death or confinement in excess of one year.

STATEMENT OF THE CASE

Petitioner Austin was discharged from the United States Navy on December 24, 1969, after fourteen years and eight months of continuous Active Duty in the Navy as an enlisted man.

During 1965, Austin was arrested by police of the Republic of Mexico in the jurisdiction of that Country. He was convicted of violation of a drug offense and, pursuant to the Federal Penal Code of the Republic of Mexico, was sentenced to four years in prison and a fine of 4000 pesos. After obtaining his release, from the Mexican prison, Austin returned to duty with the Navy immediately. On November 15, 1966, a Board of Officers was convened by the Navy which action was mandatory under Navy regulations, to consider whether or not Austin should be returned to duty with the Navy or administratively discharged. As a result of the findings and recommendations of this Administrative Board, Austin was ultimately discharged from the Navy on December 24, 1969 and barred from re-enlistment.

Austin has repeatedly alleged that he was completely innocent of the charges upon which he was convicted by the Mexican Courts and that the conviction was obtained through torture and other egregious violations of rights granted any defendant in a criminal proceeding under the laws by any civilized nation.

The Court of Claims [App., infra, p. 2], found that the Administrative Board which recommended Austin's discharge from the Navy and the termination of his career, "appeared to be strongly of the view that it could not go behind the Mexican conviction or pass in any way upon Austin's allegations that that conviction was obtained in a foreign country under conditions wholly incompatible with concepts of natural law and fundamental fairness."

The jurisdictional basis for review in the Court of Claims, alleged, was under 28 U.S.C. §1491. The Court of Claims granted the motion by the United States for Summary Judgment and denied the plaintiff's motion for Summary Judgment

WHY THE WRIT SHOULD BE GRANTED

The Court Below Did Not Adequately Consider Petitioner's Right to Continued Federal Employment

In Arnett v. Kennedy, 416 U.S. 134 (1974), the majority of this Court recognized that a nonprobationary Federal employee had a claim in the nature of a property interest in continued employment.

The Court below did not reach the issue whether or not the applicable Navy regulations had, as applied to the Petitioner, deprived him of due process of law. Instead, the Court below found that the Petitioner is barred from seeking relief in the Court of Claims because relief within the power of that Court as now prescribed by Public Law 92-415, Act of August 29, 1972, 86 Stat. 652, can only be afforded where a money judgment is entered [App., infra, p. 3].

The Court below finds that petitioner is not entitled to a money judgment in that he was an enlisted man, not an officer in the Armed Forces, and as such the United States has undertaken under

any circumstances to pay him only to the end of current enlistment [App., infra, p. 3].

Petitioner admits that there is no statute or regulation which affords him a mandatory right to have re-enlisted and further admits that at the time he was discharged from the Navy he was already past the time prescribed by the enlistment contract under which he was then serving. The question therefore, revolves on the question of whether or not enlisted men in the Armed Forces are to be afforded the same job protection as civil servants, as discussed by this Court in its separate opinions in Arnett v. Kennedy, supra, and as are officers of the Armed Forces.

This period of history is one during which the Armed Forces are being reduced in size. In establishing the Armed Forces and rules for their government and regulation, a Constitutional responsibility of Congress pursuant to Article 1, Section 8, it must be presumed that Congress did not intend career enlisted personnel to have their employment

terminated after many years of faithful service without cause, and if cause exists, without the due process safeguards to which all Americans are entitled.

Arguendo had the Court below reached the issue that the petitioner had been deprived of due process of law and had found in petitioner's favor, the Secretary of the Navy would have had the burden of justifying the code on petitioner's discharge certificate which barred him from re-enlistment, which the Court below found petitioner had been issued as a matter of fact [App., infra, p. 2].

The right to continue in the service of one's Country, especially after one has indicated by long service that he intends to make the Armed Forces his career and to complete service necessary to qualify for retirement, most certainly should be held, especially at this point in history due to the numerous Armed Forces personnel doubtless being affected, to be a property interest protectable as

such under the Fifth Amendment, even in the absence of a statute mandating a right to re-enlist at the expiration of an enlistment contract.

The crux of this issue is stated by the Court below as App., infra, p. 4, wherein it states that it would have inclined to granting petitioner's claim to relief "...If the Navy had bound itself by regulation to an automatic right of re-enlistment [citations omitted]," and at App., infra, p. 4, wherein it states that: "This rule that back pay is confined to the current enlistment--in the absence of a mandatory right to re-enlist--puts Austin's demand beyond our power to remedy."

Had the Court below decided that Armed Forces enlisted personnel have, the same as officers and civil servants, a protectable property interest in continued employment, it would have had no trouble in finding jurisdiction under 28 U.S.C. §1491 in granting, first of all, a money judgment for back pay to the date of petitioner's involuntary separation from the Navy and then, if the Court found such

further relief warranted, issuing an order directing restoration of the petitioner to an appropriate duty status in the Navy.

The discharge of employees from public jobs has long been held a legitimate subject of judicial scrutiny when constitutional rights, privileges, or immunities are involved. Garner v. Board of Public Works, 341 U.S. 716 (1951); Adler v. Board of Education, 342 U.S. 485 (1952); Slochower v. Board of Education, 350 U.S. 551 (1956). Petitioner has never urged that he has a constitutional right to continue in the Navy, but he does claim that the administrative separation or discharge from the Navy, or any other public employment, cannot be proximately predicated upon proceedings by a foreign criminal jurisdiction, which did not afford anything resembling procedural or substantive due process of law as recognized by any civilized nation.

CONCLUSION

For the foregoing reasons the petition for Certiorari should be granted.

Respectfully submitted,

RICHARD P. FOX

Attorney for Petitioner

In the United States Court of Claims

No. 5-74

(Decided April 16, 1975)

JOHN SAMUEL AUSTIN v. THE UNITED STATES

Richard P. Fox, attorney of record, for plaintiff. *Richard P. Fox and Max Gest*, of counsel.

Kenneth J. Ingram, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before DAVIS, KASHIWA, and KUNZIG, *Judges*.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

John Samuel Austin, then a Navy enlisted man, was discharged in December 1969 with a general discharge, under honorable conditions, for misconduct. He has petitioned this court for a correction of his military records to delete the discharge, and also for an award of back pay. Both sides have asked for summary judgment.

The record shows that Austin was serving his third enlistment in the Navy when, on June 19, 1965 while on leave, he was arrested by Mexican authorities at Tijuana and charged with possession of an trafficking in morphine. He and a Mexican national were subsequently convicted by a Mexican court of the trafficking charge and Austin was sentenced to a Mexican jail for four years from the date of

571-849—75

his arrest. On October 18, 1966, having posted a substantial bond, he was released from the foreign jail and returned to his duty station at the Naval Missile Center, Point Mugu, California. For the period of his Mexican confinement, he was listed as on unauthorized absence, and was not given his Navy pay. In addition, his enlistment was extended 484 days to end on March 24, 1969, to make up for the time lost.

After his return to naval duty, Austin was processed for an administrative discharge by a Navy Board of Officers under a section of the Navy Personnel Manual making such processing for possible discharge mandatory for those convicted "by civil authorities (foreign or domestic) * * * of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of 1 year; * * *" 32 C.F.R. § 730.13(b)(1) (1974). This board, before which plaintiff appeared (represented by both military and civilian counsel) and testified, recommended that he be given an undesirable discharge because of the Mexican conviction. The Chief of Naval Personnel originally approved this recommendation, but in December 1969, he ordered the character of the discharge changed to general, under honorable conditions, and plaintiff was given such a discharge, which included a code meaning that he was not recommended for reenlistment.

Plaintiff asserts in this action, as he has in several District Court suits brought to prevent his discharge, that the Navy acted improperly in separating him, because the discharge was based entirely on the Mexican conviction even though he had presented to the Board of Officers evidence that the conviction was primarily obtained through use of a confession extracted from him by torture. The Board of Officers appeared to be strongly of the view that it could not go behind the Mexican conviction or pass in any way upon Austin's allegations that that conviction was obtained in a foreign country under conditions wholly incompatible with concepts of natural law and fundamental fairness.

This is not an easy problem to unravel but we find that we need not even consider it because the court is without authority to reach that issue. The reason we have no power to assess the underlying substantive issue is that, even if

plaintiff were to prevail on his claim that the Mexican conviction could not rightly be the basis for his discharge, we could not award him any back pay or other money compensation or damages. It is of course a cardinal principle of our jurisprudence that the only suits of which we have jurisdiction under 28 U.S.C. § 1491 (Supp. III, 1973) (our general jurisdictional statute) are those in which the plaintiff seeks and can seek a money judgment. We may not give any relief unless "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; * * * [or he alleges] that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Eastport S.S.* v. *United States*, 178 Ct. Cl. 599, 605, 372 F. 2d 1002, 1007 (1967). Conversely, it is now firmly established that, since the general jurisdiction of this court is limited to money claims against the Government, we have no authority to enter a declaratory judgment, or to grant affirmative nonmonetary relief unless it is tied and subordinate to a monetary award. *United States* v. *King*, 395 U.S. 1, 5 (1969); *Jankovic* v. *United States*, 204 Ct. Cl. 807 (1974). The affirmative relief permitted by the first sentence of Public Law 92-415, the Act of August 29, 1972, 86 Stat. 652,[1] can be given only where a money judgment is entered; that is the "judgment" of which the statute speaks. *See Jankovic* v. *United States*, *supra*.

Why is it that we cannot grant this plaintiff a money judgment if he should win on the merits of his claim? In the decisions dealing with enlisted personnel, the court has consistently held that since these servicemen have no right to reenlist at the expiration of their current enlistments, the United States has undertaken to pay them only to the end of the current enlistment, unless it properly discharges them prior to that time. *Rowe* v. *United States*, 167 Ct. Cl. 468, 470–72 (1964), *cert. denied*, 380 U.S. 961 (1965). Thus, for example, in *Clackum* v. *United States*, 148 Ct. Cl. 404, 296

[1] "To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States."

F. 2d 226 (1960), where we found the discharge invalid because of the grossest sort of procedural and constitutional irregularity, 148 Ct. Cl. at 409–10, 296 F. 2d at 229, we limited recovery to the period between the time of the illegal discharge and the end of that plaintiff's then-current enlistment. 161 Ct. Cl. 34, 36 (1963). *See also* to the same effect, *Murray* v. *United States*, 154 Ct. Cl. 185, 191 (1961); *Sofranoff* v. *United States*, 165 Ct. Cl. 470, 479 (1964); *O'Callahan* v. *United States*, 196 Ct. Cl. 556, 559–62, 451 F. 2d 1390, 1392–93 (1971).

In two cases we did find that an enlisted man had a firm right to reenlist, and therefore that his recovery did not end with the termination of his then enlistment. *See Diamond* v. *United States*, 170 Ct. Cl. 166, 344 F. 2d 703 (1965); *Smith* v. *United States*, 155 Ct. Cl. 682 (1961). However, as pointed out in *O'Callahan* v. *United States*, *supra*, 196 Ct. Cl. at 561–62, 451 F. 2d at 1393, both those holdings were grounded in special statutory rights of reenlistment. While we would be inclined to the same result if the Navy had bound itself by regulation to an automatic right of reenlistment, *see Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *United States* v. *Nixon*, 418 U.S. , (1974), we have not been cited to nor have we in our own research found any statute or regulation which would give this plaintiff such a mandatory right to reenlist.

This rule that back pay is confined to the current enlistment—in the absence of a mandatory right to reenlist—puts Austin's demand beyond our power to remedy. By various legal proceedings he delayed his actual discharge (December 24, 1969) nine months beyond the scheduled end of his enlistment, as extended (March 24, 1969). He was in fact paid to the later date and therefore now has no money claim against the Government.[2]

We have considered, in this connection, the point that plaintiff might possibly have a valid claim (if he is right as to the status of the Mexican conviction) for the 484 days for which he was not paid while he was in jail in Mexico, but

[2] While plaintiff held an AT1 pay rating prior to his Mexican adventures, he was reduced to ATR2 by non-judicial punishment in November 1966, and served out his enlistment at that rate. Plaintiff has not contested in this court this non-judicial punishment and demotion, and we do not consider the possibility that that action might have raised a monetary claim.

have concluded that such a claim is unsound under the governing statutes and regulations. Section 503(a) of title 37 of the U.S. Code states that

> A member of the Army, Navy, * * * who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable.

This provision is in the title of the Code dealing with pay, and not that concerned with punishment. Its statutory background is in pay legislation where, for example, absence with authorization in excess of that allowed by statute is similarly treated. *See* Act of Aug. 9, 1946, ch. 931, § 4, 60 Stat. 964; Act of Aug. 4, 1947, ch. 475, § 1, 61 Stat. 748. The section is clearly nonpunitive; it is meant merely to withhold pay from servicemen for time during which, on their own, they are not available for duty.

Correlative to 37 U.S.C. § 503(a) are the provisions authorizing an extension of service to make up lost time. The pertinent Navy regulation is 32 C.F.R. § 730.4a (1974), based on 10 U.S.C. § 972 (1970), which allows the Service to require an enlisted man to make up time lost when he, among other things:

> (2) is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority;
>
> (3) is confined for more than one day while awaiting trial and disposition of his case, and whose conviction has become final;
>
> (4) is confined for more than one day under a sentence that has become final; * * *

The history of this statute indicates that its purpose was to discourage any sort of absence by which a serviceman, by his own injudicious conduct (including, for example, intemperate use of liquor), makes himself unavailable for duty. *See* Act of July 24, 1956, ch. 692, 70 Stat. 631; Act of June 4, 1920, ch. 227, Art. 107, 41 Stat. 809; S. Rep. No. 2549, 84th Cong., 2d Sess. (1956).

In this case the Navy could rightly find that, on any view of the facts, plaintiff's absence was not unavoidable and that he was absent without proper authority while detained in

Mexico. Even if the Mexican conviction is deemed in itself to be an improper basis for loss of pay and extension of service, the undenied fact is that Austin, of his own choice, was in Mexico in connection with drug activities and that he was arrested there while in the course of trying to arrange a transfer of narcotics. He insists that he engaged in these activities solely in order to entrap others and to receive the bounties available for turning smugglers over at the border. Whether or not his motives were so law-abiding, there is no doubt that plaintiff, not a narcotics agent or a member of the Naval Intelligence Service, had no duty to engage in such activities, and that he therefore absented himself from his post by his own actions, combined of course with the bad luck of his having picked an FBI agent to attempt to entrap. We think, therefore, that the statutes and regulations were properly applied in his case, and he does not have a valid claim for payment for the 484 days.

On this basis, we grant the defendant's motion for summary judgment, deny the plaintiff's motion, and dismiss the petition. Plaintiff is, of course, free to bring suit for the declaratory relief we are unable to grant in the appropriate federal district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-52

JOHN SAMUEL AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Court of Claims erred in dismissing his suit for correction of his military records and back pay.

In June 1965, petitioner, who was serving his third enlistment in the Navy, was jailed on drug-trafficking charges by Mexican authorities while he was in Tijuana, Mexico. He was subsequently tried and convicted in the Mexican courts and sentenced to four years' imprisonment. On October 18, 1966, sixteen months after his arrest, he was released and was returned to his duty station at the Naval Missile Center, where he had been listed as absent without authorization. During his unexcused absence, his pay had been forfeited under 37 U.S.C. 503(a); on his return, his enlistment was extended 484 days to make up the lost time, pursuant to 10 U.S.C. 972 (Pet. App. 1-2).

After his return, a Navy Board of Officers convened to consider whether petitioner should be discharged for misconduct. Such proceedings are mandatory in cases of "[c]onviction by civil authorities (foreign or domestic) or action taken which is tantamount to [a finding of] guilty of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of one year * * *." 32 C.F.R. 730.13(b)(1). After an evidentiary hearing, the Board recommended that petitioner be discharged (Pet. App. 2).

Petitioner sued in the United States District Court for the Southern District of California to enjoin his discharge. The district court dismissed his complaint, the court of appeals affirmed, *per curiam*, 412 F.2d 1187 (C.A. 9), and this Court denied certiorari, 396 U.S. 973.[1] Petitioner had been retained in the Navy at full pay beyond the scheduled expiration of his enlistment, as extended, while he unsuccessfully exhausted his appellate remedies. In December 1969 petitioner was finally discharged, with a general discharge "under honorable conditions" bearing a code indicating that he was not eligible for reenlistment (Pet. App. 2, 4).

Petitioner applied to the Navy Discharge Review Board to change the character of his discharge and, subsequently, to the Armed Forces Board for the Correction of Military Records for expungement from the Navy's records of all references to his Mexican conviction. Both Boards denied the requested relief.

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[1]An identical action filed by petitioner in August 1969, was dismissed as *res judicata*. *Austin* v. *United States*, No. 69-246-S (S.D. Calif.).

Petitioner brought this action in the Court of Claims in 1974,[2] alleging that his Mexican conviction was based upon a confession obtained by torture. On cross-motions for summary judgment, the Court of Claims dismissed.

1. The Court of Claims correctly dismissed Austin's petition. An enlisted man who, like petitioner, has no statutory or regulatory right to reenlist, may recover back pay for wrongful discharge only from the date of discharge to the date on which the enlistment he was then serving would otherwise have expired. *Rowe* v. *United States,* 167 Ct. Cl. 468, certiorari denied, 380 U.S. 961; *Clackum* v. *United States,* 296 F.2d 226 (Ct. Cl.). Petitioner already had been paid to and beyond the expiration of his enlistment. Thus even if he had been able to establish that his discharge was based upon a mistake in fact, he would not have been entitled to any back pay.[3] Since petitioner under no circumstances would be entitled to a money judgment, the Court of Claims lacked further jurisdiction. *United States* v. *King,* 395 U.S. 1, 2-3; *Glidden Company* v. *Zdanok,* 370 U.S. 530, 557; *United States* v. *Alire,* 6 Wall. 573, 575. Although that court is now empowered to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records * * *," such relief must be "an incident of and collateral to" a money judgment. 28 U.S.C. (Supp. III) 1491.

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[2]In 1972, petitioner sued for a writ of habeas corpus to review his discharge, but the writ was denied because petitioner was not in custody. *Austin* v. *Warner,* 483 F.2d 70 (C.A. 9).

[3]Petitioner makes no claim here that he was entitled to be paid while he was absent from duty.

2. Petitioner asserts that although no statute or regulation affords him a right to reenlist, he nevertheless has a constitutionally protected "property interest" in being able to reenlist. This contention is without merit.

A "property interest" must be rooted elsewhere than in the Constitution, and petitioner is unable to point to any such source for his claimed right to reenlist. As this Court noted in *Board of Regents* v. *Roth,* 408 U.S. 564, 577:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

The facts of the present case are similar to those in *Roth,* for there is nothing in petitioner's enlistment agreement or in any statute or regulation that creates a legitimate claim of entitlement to employment beyond the expiration of his enlistment. Accordingly, petitioner "has no property right in continued military employment because there is no source for it other than his own 'expectancy.' " *Sims* v. *Fox,* 505 F.2d 857, 862 (C.A. 5) (*en banc*), certiorari denied, June 9, 1975, No. 74-1235.

Even if petitioner had a property interest in reenlisting, the only constitutional protection afforded such an interest is that it may not be extinguished without due process, and the requirements of due process were met here. Before his discharge, petitioner had a full hearing at which he was represented by both civilian and military counsel (Pet. App. 2). The Board of Officers that recommended his discharge took petitioner's own testimony and the testimony of three of his witnesses,

and had before it as well a translation of petitioner's Mexican trial transcript (Def. Cross-Mo. for Sum. Judg. Exhs. C, D, and E). In light of this hearing, and the subsequent proceedings before the administrative boards, there is no basis for any contention that petitioner did not receive due process.

But even if the hearing procedures used by the Navy had not complied with due process, petitioner, at this stage, would be entitled not to money damages, but only to a post-discharge hearing. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134; *Sampson* v. *Murray*, 415 U.S. 61. And the Court of Claims lacks equitable jurisdiction to order such a hearing. *United States* v. *King, supra,* 395 U.S. at 3-5.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.